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Concord

May 3, 1974

Mr. Newell J. Paire
Commissioner
Department of Education
State House Annex
Concord, New Hampshire 03301

Dear Mr. Paire:

In a letter dated April 29, 1974, as amended April 30, 1974, you have requested opinions on the following questions:

(1) Are teachers who have not been employed the requisite three years and not nominated for re-employment, entitled to a hearing under RSA 189:14-b?

(2) Are teachers holding "Provisional Certificates" entitled to a hearing under RSA 14-b, if they have been employed three or more years?

(3) Can we hold hearings via the "class action" route rather than hearing the teachers individually?

(4) If the State Board sends a certified letter to each teacher eligible for a hearing, does this satisfy the requirement of appropriate notice?

(5) Will it be possible for a representative or representatives from the Attorney General's Office to be in attendance during all of the hearings?

Inasmuch as your request was first made known and presented to this office on April 29, 1974, and an answer required by April 30, 1974, time limitations prevent extensive review of considerations leading to the opinions here expressed. I would be remiss

if I did not advise you that this office was rather surprised by the language and tone of the Board's resolution inasmuch as it set what we believe to be an unreasonably close deadline. I am aware that the Board has been faced with many serious problems recently. However, let me point out to you that this office is responsible for legal advice and other action to more than ninety State boards and agencies, the Governor and Council, the Legislature, as well as for discharging vital responsibilities in the area of administration of criminal justice. I frankly think that this staff does rather well and implications such as yours are not appreciated.

RSA 189:14-a provides:

> Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or reelected. Any such teacher who has taught for three or more years in the same school district and who has been so notified may request in writing within five days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected. The school board, upon receipt of said request, shall provide for a hearing on the request to be held within fifteen days. The school board shall issue its decision in writing within fifteen days of the close of the hearing. [Emphasis added.]

RSA 189:14-b provides:

> A teacher aggrieved by such decision may request the state board of education for review thereof. Such request must be in writing and filed with the state board within ten days after the issuance of the decision to be reviewed. Upon receipt of such request, the state board shall notify the school board of the request for review, and shall forthwith proceed to a consideration of the matter. Such consideration shall include a hearing if either party shall request it. The state board shall issue its decision within fifteen days after the request for review is filed, and the decision of the state board shall be final and binding upon both parties. [Emphasis added.]

With regard to the first question you have raised, RSA 189:14-b provides an administrative procedure in the event a teacher aggrieved by "such" decision requests it. The use of the word "such" to modify "decision" in the first sentence in RSA 189:14-b relates back to the final sentence of RSA 189:14-a, which provision sets out the administrative procedure at the local level. The final sentence of RSA 189:14-a provides that the school board shall issue its "decision" in writing within fifteen days of the close of the "hearing". This "hearing" is available, under the third-to-last sentence of the provision, only to those teachers who have taught "three or more years" in the same school district.

Senator Holmes described the scope of the bill which became RSA 189:14-a, b in the following way:

> Mr. President, SB 57 is a re-written bill. It is not so far reaching as the original bill to which there was great opposition by school board members and citizens. The new version attempts to give a certified teacher whose contract is not to be renewed after three years in a school, a fair hearing.. We believe that this is a fair arrangement for protecting the teacher and for avoiding infringement of the rights of the school board. 1957 N.H.S. Jour. 688, 689.

The New Hampshire Supreme Court held in Plymouth School Dist. v. State Bd. of Educ., 112 N.H. 74 (1972):

> We are of the opinion that RSA 189:14-a was enacted to protect against unjust removal those teachers who have shown by educational attainment and by probationary trial their fitness to teach. This has been accomplished by providing these teachers with certain procedural safeguards in case of dismissal after they have served the required length of time in a particular school district. [Emphasis added.]

The United States Court of Appeals, First Circuit held in Drown v. Portsmouth School Dist., 435 F 2d 1183 (1970):

> Under New Hampshire law and pursuant to appellant's one year contract, a non-tenured teacher may not be dismissed without cause and without being afforded certain procedural rights during the school year, and tenured teachers are entitled to similar safeguards if they are not rehired .... But a failure to rehire a non-tenured teacher affords the teacher no rights other than to notification by March 15 of the school year.

Since teachers who have not served the required length of time in a probationary status are not entitled under RSA 189:14-a to a decision of the local school board, after hearing, it would be anomolous to hold that the same class of teachers are entitled to a review of such decision. Therefore, the answer to your first question is "no".

It should be noted, however, that the language of RSA 189:14-a, b does not prohibit a state board review of a local decision not to renominate or rehire a teacher who has not taught in the district for three years. Further, this opinion does not address the question of the constitutionality of the school board's decision to deny hearings to such teachers, as that is a local matter.

In the second question you seek, as we understand it, a determination as to whether the phrase "professional standards certificate" contained in RSA 189:14-a provides a legally sufficient basis for distinguishing between the various classes of teaching credentials issued by the State Board. If the phrase refers to some but not all of the classes of teaching credentials, then those teachers who hold credentials not within the scope of the above phrase would not be entitled to a hearing before the local school board if not rehired because a teacher must hold a "professional standards certificate" to be entitled to a hearing before the school board under RSA 189:14-a. The second sentence of RSA 189:14-a provides that "[a]ny such teacher [emphasis added]" who has taught for at least three years in the district is entitled to a hearing, and "such" refers back to the first sentence which provides:

> Any teacher who has a professional standards certificate from the state board of education and has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or reelected. [Emphasis added.]

If the phrase "professional standards certificate" were not to encompass all the classes of teaching credentials issued by the State Board, and as a result teachers who hold credentials not within the scope of the phrase were not entitled to a hearing before the local school board, then said teachers would not be entitled to a State Board review, as explained in the answer to question (1) above.

The various classes of teaching credentials have been established by the State Board, in the form of regulations, pursuant to RSA 186:11, X, which provision requires the State Board, through the Commissioner, to establish certification regulations. State Board of Education Regulations: Licensing of Educational Personnel at 8-11 sets out and defines the various classes of credentials which consist of:

Professional Certificate
Standard Certificate
Standard License
Provisional Conversion License
Non-degree Conversion License
Non-degree Certificate
Student Teacher License
Educational Intern Certificate
Educational Associate Certificate
Educational Assistant Certificate
Educational Aide Certificate
Permit (sub-standard)

The labels applied to the above classes of credentials do not relate in any meaningful way to the language used in the statute, such that it is apparent which classes, if any, are intended not to fall within the meaning of the phrase "professional standards certificate". Therefore, in our opinion, no legally sufficient basis exists to deny a school board hearing and thus a State Board review of such a hearing to teachers who hold the more provisional credentials. Accordingly, the answer to your second question is "yes".

With regard to the third question, in light of the additional factual material you have supplied on May 1, 1974, you have asked as we understand it whether the State Board may consolidate, for the purposes of a review hearing held pursuant to RSA 189:14-b, fifty-three individual teacher requests for review of the Timberlane School Board decision to sustain the Superintendent's decision not to renominate said teachers. You have indicated that the basis for the school board's decision with regard to each and all of the fifty-three teachers was as follows:

1. That the teachers are under contract with the Timberlane Schools.

2. That the teachers did not report to work between February 27 and March 12.

3. That the teachers did not offer any valid reasons for their absence during that time.

4. That the teachers were given a full opportunity to explain why they did not return to work.

You have stated that the consolidation contemplated would place the burden of going forward first upon each of the teachers who have requested a hearing, to present evidence individually and sequentially, in the alternative, or collectively with regard to any group of two or more teachers who so desire. Then the burden of going forward would shift to the school board, to present evidence with regard to each and all of said teachers. Finally, the presentation of evidence would be followed by separate State Board decisions on each of the teachers' requests, announced at the same time.

Insofar as the consolidation contemplated provides an opportunity for each teacher to be heard and provides that each teacher will receive a decision based solely upon the evidence presented with regard to him, the requirement implicit in RSA 189:14-b that each teacher be accorded a consideration of his own request is met. Such a consolidated hearing would be distinguishable from separate hearings only with regard to the order in which evidence is received, and would retain the separate identity of each teacher request for review, as distinguished from an organic consolidation.

The question you have raised has not been squarely presented either to the New Hampshire or United States Supreme Court. There is, however, precedent which is not binding on either of those courts for the proposition that administrative bodies may consolidate petitions for hearings to avoid multiplicity of parties and duplication of effort at least with regard to intervenors. Office of Communication of United Church of Christ v. FCC, 359 F 2d 994, 123 U.S. App. D.C. (1966). See, Civil Aeronautics Board v. State Airlines, 338 U.S. 573, 94 L ed 356 (1949), where the decision of a federal administrative body in a case which consolidated forty-five petitions from twenty-six parties, was affirmed on other grounds. Further, a trial court's consolidation of three criminal indictments, each charging mail fraud of the same defendant and together covering a period of over six months, in the absence of a statute permitting it and over the defendant's objection, was sustained in Brown v. United States (1905 CA 8 MO) 143 F 60, Cert den 202 U.S. 620, 50 L ed 1174, 26 S. Ct. 765.

The New Hampshire Supreme Court held in State v. Freije, 109 N.H. 291 (1969), affirming consolidation by the trial court of six separate indictments, all of which charged a single defendant with obtaining goods by false pretenses and alleged use of a particular credit card and false name to obtain tires, within a period of two months:

> An order consolidating indictments for trial is within the province of the Trial Court and will not be reversed here unless it appears the order prejudiced defendants. The desirability of consolidation is apparent when the crimes charged are related or apparently part of a common scheme or plan .... The defendant in such cases cannot claim prejudice, since evidence of the other charges would have been admissible in the trial of any one. [Emphasis added.]

This case suggests a standard to apply to the facts of a particular case to determine whether consolidation is desirable: Have the individual petitions arisen from a related or common plan? If the answer to this question is "yes", the case suggests a second standard to determine whether consolidation though desirable will nonetheless result in prejudice to a substantial right of a party: Would evidence with regard to all other petitions be admissible in a hearing with regard to any one petition? If the above two standards apply to the question of consolidation by a trial court of indictments in a criminal case, where a guilty verdict resulted in imprisonment, it would be anomolous to suggest that less permissive standards must apply with regard to consolidation by an administrative body of requests to review an administrative decision, where affirming such a decision would result in the non-renewal of an employment contract.

Further, Superior Court Rule 100, contained in RSA 491:App. R 100 (supp), underscores the reasonableness of the standards outlined above, with regard to civil actions:

> Whenever a motion is filed in any county requesting the transfer of an action there pending to another county for trial with an action there pending, arising out of the same transaction or event, or involving common issues of law, and/or fact, the Presiding Justice may, after notice to all parties in all such actions pending in the State, and hearing, make such order for consolidation in any one of such counties in which such actions are pending, as justice and convenience requires. [Emphasis added.]

This rule suggests essentially the same standard on the question of desirability of consolidation as the Freije case, above quoted: Do the various requests arise out of the same transaction or event, or involve common issues of law and/or fact? And the rule indicates that a decision as to prejudice to a substantial right of a party be based upon considerations of both justice and convenience. The rule further contains a requirement that Presiding Justice notify the parties that of the contemplated consolidation and then hear the parties on the question.

Although the above legal authorities do not provide a certain answer to your question, the advice of this office, with regard to your question, is to proceed as follows: In your letter of notification to the parties, indicate that the requests for review of the school board decision will be consolidated as outlined above, in the first paragraph of the answer to the question, but that any party may object and present arguments as to prejudice at the outset of the hearing. If no party objects to such consolidation, you may proceed with the hearing in the consolidated fashion set out above. If any party objects, you are advised to consult with this office for an opinion which considers the arguments presented by the objecting party.

With regard to your fourth question, as amended April 30, 1974, and in light of the factual material supplied May 1 and May 2, 1974, you have asked as we understand it whether a letter sent by certified mail constitutes sufficient notice of a hearing held pursuant to RSA 189:14-b. You have stated that no request received by the Department of Education for a review of the Timberlane School Board's decision contains a return address. You have supplied a list which indicates that of the fifty-three teachers whose cases were heard by the Timberlane School Board, twenty-three accepted certified letters from the Commissioner of Education dated March 28, 1974 notifying said teachers of a State Board hearing on the question of decertification, while twenty-seven were either rejected or unclaimed and three are unaccounted for.

You are advised to proceed as follows: Obtain as correct and current addresses as possible of said teachers from the Superintendent, School Board, and Teachers' Association, and any other sources likely to have the addresses. Send notice by certified mail, return receipt requested and by regular mail to all of the parties, and, on their behalf, to any attorneys who represented the parties before the School Board in the hearing held pursuant to RSA 189:14-a. In those cases where said return receipts are not received, obtain personal service by the Sheriff's Department. Publish the notice in whatever newspapers will be likely to reach the parties.

In regard to the final question you have raised, the policy of this office is to provide legal representation, when it is needed, to all departments, agencies, boards and commissions in the State government; as a rule we do not attend administrative hearings. If you can anticipate any questions regarding these hearings, we would appreciate hearing from you at once. In view of the somehwat unusual nature of this matter, we shall endeavor to depart from that policy to the extent made possible by the then current workload. Let me assure you, however, that major questions pertaining to the conduct of the hearings will be answered promptly.

Sincerely,

Warren B. Rudman

Warren B. Rudman
Attorney General

WBR: JSK/tlv